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April 11, 2005

The Honorable Charles L.A. Terreni
Chief Clerk/Administrator
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, South Carolina 29210

RE: Docket No. 2004-316-C – Petition of BellSouth Telecommunications, Inc. to Establish Generic Docket to Consider Amendments to Interconnection Agreements resulting from Changes of Law

Dear Mr. Terreni:

At its meeting on April 5, 2005, the Public Service Commission of South Carolina (Commission) invited the parties to the above-referenced proceeding to submit further briefing or proposed orders regarding the impact of the Order dated April 5, 2005, of the United States District Court for the Northern District of Georgia (Georgia District Court). The Office of Regulatory Staff (ORS) respectfully submits this letter as its comments in response to the Commission's invitation for further briefing.

As the Commission is well-aware, the issues presently before the Commission arise from the FCC's issuance of the *Triennial Review Remand Order (TRRO)* and its interpretation. In its Order of April 5, 2005, the Georgia District Court granted an Emergency Motion for Preliminary Injunction filed by BellSouth Telecommunications, Inc. (BellSouth) and preliminarily enjoined the Georgia Public Service Commission (Georgia PSC) and other defendants from seeking to enforce an order issued by the Georgia PSC on March 8, 2005. The order of the Georgia PSC ruled on a Motion for Emergency Relief Concerning UNE-P Orders filed by MCI MetroAccess Transmission Services, LLC (MCI). The Georgia PSC in ruling on MCI's Motion concluded that the *TRRO* was not self-effectuating as asserted by BellSouth and that the parties to interconnection agreements must abide by the change of law provisions contained in their interconnection agreements to implement the terms of the *TRRO*.

At the oral arguments before this Commission held on March 10, 2005, the ORS asserted that the FCC's *TRRO* was not self-effectuating as asserted by BellSouth. ORS noted that the term "self-effectuating" appears only once in the entire order and clearly appears to apply to the impairment framework adopted in the *TRRO*. The ORS also argued before the Commission that the order of the Georgia PSC set forth an appropriate and logical analysis of the *Mobile Sierra* doctrine which BellSouth had cited in its response to MCI's Motion. The Georgia PSC recognized that the *Mobile Sierra* doctrine allows an administrative agency such as the FCC to modify the terms of a contract upon a finding that the modification will serve the public need. The Georgia PSC also recognized that the case law regarding the *Mobile Sierra* doctrine requires a showing that the public interest standard needed to modify or alter the terms of an existing contract is significantly more particularized and requires analysis of how the contract harms the public interest and of the extent to which reformation mitigates the contract's deleterious effect. However, upon examination of the FCC's analysis in the *TRRO*, the Georgia PSC noted that there was no reference to a statement by the FCC that it intended to reform the interconnection agreements. Further, the Georgia PSC noted that it was not provided any reference to statements in the *TRRO* that modification of the interconnection agreements was in the public interest and further that there was no analysis cited of why reformation of the interconnection agreements would be in the public interest. The Georgia PSC concluded that the FCC had not intended to abrogate the rights of the parties under their respective interconnection agreements and that the parties must abide by the change of law provisions contained in their interconnection agreements.

The Georgia District Court did not comment on the Georgia PSC's analysis of the *Mobile Sierra* doctrine other than to acknowledge that the Georgia PSC did not dispute that the FCC has the authority to amend the agreements and thus make the *TRRO* effective immediately regardless of the contents of the interconnection agreements. Instead the Georgia District Court indicated that it would be appropriate for the FCC to make the *TRRO* immediately effective in order to undo the FCC's prior decisions which were vacated by the federal courts. The Georgia District Court, in finding that BellSouth's motion is consistent with and will advance the public interest, noted that the FCC determined in the *TRRO* that UNE-P harms competition and is contrary to the public interest. Order, p. 9. As evidence of continued reliance on UNE-P being against public policy, the Georgia District Court pointed to its discussion of paragraph 218 of the *TRRO,* where the FCC stated that UNE-P "hinder[s] the development of genuine, facilities-based competition" contrary to the federal policy reflected in the Telecommunications Act of 1996.

The Georgia District Court also indicated that the Georgia PSC's and the CLECs reliance on and apparent interpretation of paragraph 233 of the *TRRO* render that paragraph inconsistent with the rest of the FCC's decision. Paragraph 233 provides that "carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order." *TRRO*, ¶ 233. The Georgia District Court found

> a significant likelihood that it would agree with the conclusion of the New York Public Service Commission that paragraph 233 "must be read together with the FCC directives that [UNE Platform] obligations for new customers are eliminated as of March 11, 2005." ... Any result other than precluding new UNE Platform customers on March 11 would "run contrary to the express directive ... that no new [UNE Platform] customers be added" and thus result in a self-contradictory order. (citations omitted). Order, p. 9.

After reviewing the Order of the Georgia District Court, ORS finds no sufficient legal basis to disagree with it. However, ORS does assert that additional time to negotiate a new contractual rate would be in the public interest. While there is no requirement in the *TRRO* for an additional period in which to negotiate a new contractual rate or new agreements, ORS believes that the public interest would be served by the granting of such a period of negotiation. BellSouth was able to obtain the preliminary injunction in Georgia because it showed the Georgia District Court that BellSouth was currently suffering significant irreparable injury by losing up to 3200 customers a week to competitors using UNE-P. However, South Carolina does not have a city nearly the size of Atlanta, and it is unlikely that BellSouth would lose nearly the number of customers in South Carolina that it might lose in Georgia. Thus, the impact to BellSouth could be significantly less in South Carolina. In addition, South Carolina consumers could benefit by the suggested limited period for negotiation. In weighing the public interest, ORS would request that the CLECs in South Carolina be granted 51 days from April 18 in which to negotiate new agreements for the provision of the delisted UNEs in the *TRRO* and that BellSouth be granted a true-up mechanism to the negotiated rate back to March 8. This suggestion would provide CLECs with a 90 day period in which to have negotiated new agreements from the March 8 date listed in BellSouth's original Carrier Notification Letter following issuance of the *TRRO* and/or work towards establishing their own facilities-based switching.

Sincerely,

Florence P. Belser
General Counsel

FPB/rng

cc: All Parties of Record